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Chapter 255: Finding the Leaks in the Sustainable Groundwater Management Act

Nicholaus E. Johnson

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Chapter 255: Finding the Leaks in the Sustainable Groundwater Management Act

Nicholaus E. Johnson

Code Sections Affected

Water Code § 10729.2 (new), §§ 5202, 10720.5, 10720.7, 10722.2, 10722.4, 10723, 10723.6, 10723.8, 10724, 10726.8, 10730.2, 10733.2, 10735.2, 10735.4, 10735.6, 10933 (amended), § 10733.3 (repealed).
SB 13 (Pavley); 2015 STAT. Ch. 255.

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I. INTRODUCTION

On January 14, 2014, Governor Jerry Brown declared a state of emergency.¹ Suffering from severe drought since 2012, California desperately needed water for its communities.² Governor Brown called on “all Californians to conserve water in every way possible” because of a decrease in agricultural production, an increase in wildfires, and a fear of drinking water shortages.³ Even before declaring a state of emergency, Brown signed an executive order in May 2013, allowing the government to implement actions more quickly and asking Californians to continue conserving water.⁴

California’s water supply is a diverse puzzle.⁵ Groundwater is an essential piece to that puzzle.⁶ In response to an ever-increasing shortage of groundwater, the legislature passed the Sustainable Groundwater Management Act of 2014 (SGMA).⁷ SGMA provided a solid foundation, however, it was not a perfect series of bills.⁸ In 2015, the legislature attempted to remedy the uncertainties left by SGMA with a slew of groundwater legislation.⁹ When these bills reached the Senate Committee on Natural Resources and Water, the committee consolidated them into Senator Fran Pavley’s bill—Chapter 255.¹⁰ While Chapter 255 makes some changes to SGMA, it does not include all possible methods for improving groundwater management to completely sustain California’s groundwater.¹¹

II. LEGAL BACKGROUND

Chapter 255 attempts to aid the implementation of the Sustainable Groundwater Management Act.¹² SGMA was a three-bill package comprising AB 1739, SB 1168, and SB 1319—Governor Brown’s administration vastly

1. Press Release, Office of Governor Edmond G. Brown Jr., State of Emergency Declaring Drought (Jan. 17, 2014), *available at* <http://gov.ca.gov/news.php?id=18368> [hereinafter Emergency Press Release] (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. OFFICE OF ASSEMBLY MEMBER SUSAN EGGMAN, AB 647 FACT SHEET (2015–16 Reg. Sess.) [hereinafter AB 647 FACT SHEET] (on file with *The University of the Pacific Law Review*).

6. *Id.*

7. Press Release, CA Water Found., California Water Foundation Praises Gov. Brown’s Signing of Landmark Groundwater Legislation into Law (Sept. 16, 2014) (on file with *The University of the Pacific Law Review*).

8. *See infra* Part II (explaining the legal background of SGMA).

9. *See infra* note 154 and accompanying text (describing the various groundwater legislation introduced to remedy SGMA).

10. *See infra* Part IV.B (explaining how the legislation was consolidated into Chapter 255).

11. *See infra* Part IV (analyzing the changes Chapter 255 makes to SGMA and their potential impact).

12. *See* 2015 Cal. STAT. ch. 255 (amending sections of the Water Code created by SGMA).

supported each bill.¹³ Following reports from the Association of California Water Agencies (ACWA), the California Water foundation (CWF), and many stakeholder meetings, the governor signed the three-bill package into law on September 16, 2014.¹⁴ This section will discuss Governor Brown's support of SGMA, the origins of the three-bill package, and the impact ACWA and CWF had on SGMA's existing law.¹⁵

A. Support from Governor Jerry Brown and the Three-Bill Package

In January 2014, Governor Brown released his California Water Action Plan detailing the importance of protecting groundwater basins at risk of overdraft.¹⁶ The governor believed the plan was essential for California to manage water wisely.¹⁷ He also believed that if local agencies were unable to protect groundwater basins, the importance of groundwater sustainability necessitated state intervention.¹⁸ In his 2014 budget, Governor Brown prioritized finding solutions to California's water problems.¹⁹

Soon after the Governor voiced his concerns, the legislature delved into groundwater regulation.²⁰ In February 2014, Assembly Member Roger Dickinson introduced AB 1739 to give the State Water Board power to place a basin on probationary and to create interim plans for sustainability during that status.²¹ Then, Senator Pavley introduced SB 1168 to allow the State Water Board to designate basins as "high-, medium- or low-priority."²² These two bills arose

13. STATE OF CALIFORNIA, SUSTAINABLE GROUNDWATER MANAGEMENT ACT BROCHURE (2015), available at http://groundwater.ca.gov/docs/sgma_brochure_jan_2015.pdf [hereinafter, SGMA BROCHURE] (on file with *The University of the Pacific Law Review*).

14. Press Release, CA Water Found., *supra* note 7; ASS'N OF CAL. WATER AGENCIES, RECOMMENDATIONS FOR ACHIEVING GROUNDWATER SUSTAINABILITY 1 (2014) [hereinafter RECOMMENDATIONS].

15. See *infra* Part II (demonstrating Governor Brown's support and referencing the impact ACWA and CWF had on SGMA).

16. OFFICE OF GOVERNOR EDMUND G. BROWN, JR., CALIFORNIA WATER ACTION PLAN 13 (2014) [hereinafter CALIFORNIA WATER ACTION PLAN].

17. Press Release, Office of Governor Edmond G. Brown Jr., Governor Brown Signs Historic Groundwater Legislation (Sept. 16, 2014), <http://gov.ca.gov/news.php?id=18701> [hereinafter Signing Press Release] (on file with *The University of the Pacific Law Review*).

18. CALIFORNIA WATER ACTION PLAN, *supra* note 16, at 14.

19. OFFICE OF GOVERNOR EDMUND G. BROWN, JR., 2014 CALIFORNIA FIVE-YEAR INFRASTRUCTURE PLAN 25 (2014).

20. See AB 1168, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (enacted by Chapter 346); AB 1739, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (enacted by Chapter 347) (illustrating the various bills introduced after Governor Brown mentioned the importance of preserving groundwater).

21. Matt Williams, *Groundwater Bills Move Forward in the Legislature*, ASS'N OF CAL. WATER AGENCIES (May 28, 2014), <http://www.acwa.com/news/water-news/groundwater-bills-move-forward-legislature> (on file with *The University of the Pacific Law Review*).

22. AB 1168, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (enacted by Chapter 346); Williams, *supra* note 21.

from ACWA's 2011 report emphasizing the importance of local control over groundwater basins.²³ According to the report, providing local control was the most effective means to achieve sustainable groundwater management.²⁴ Unfortunately, local control alone was ineffective, and local agencies required enhanced authority to accomplish their sustainability goals.²⁵

In order to assess the policies surrounding groundwater, committees from both houses held informational hearings.²⁶ Those hearings revealed that, at the time, local agencies could not create sustainable cycles of extraction because the groundwater pumping policies were inadequate.²⁷ Soon after, Senator Pavley introduced SB 1319 to add additional criteria basins must meet before receiving a probationary status, thus strengthening the bill package.²⁸ Governor Brown signed the three-bill package into law on September 16, 2014.²⁹

B. ACWA and CWF Influence on SGMA's Existing Law

The authors incorporated many of ACWA's and CWF's recommendations into the SGMA.³⁰ These recommendations included defining the relationship between groundwater and surface water, improving local agencies' regulatory tools, articulating sustainability standards, and providing a state "backstop" authority when local agency action fails.³¹ The SGMA also provides local agencies with the tools and incentives needed to protect groundwater basins and users' rights.³² Subsection one explains the prioritization of basins and how

23. See 2014 Cal. Legis. Serv. ch. 346 (enacting CAL. WATER CODE § 113) (emphasizing local control); see also Williams, *supra* note 21; ASS'N OF CAL. WATER AGENCIES, SUSTAINABILITY FROM THE GROUND UP: GROUNDWATER MANAGEMENT IN CALIFORNIA—A FRAMEWORK (2011) (providing a framework for sustainable ground water management in California).

24. RECOMMENDATIONS, *supra* note 14.

25. *Id.* at 9.

26. Hearing Agenda, *Joint Informational Hearing on Management of California's Groundwater Resources Before the Assem. Water, Parks & Wildlife Comm. and the Assem. Budget Subcomm. No. 3*, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (on file with *The University of the Pacific Law Review*); Hearing Agenda, *Oversight Hearing on Managing California's Groundwater: Issues and Challenge Before the S. Natural Res. & Water Comm.*, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (on file with *The University of the Pacific Law Review*).

27. RICHARD M. FRANK, CALIFORNIA GROUNDWATER LAW: AN OVERVIEW (2014).

28. See 2014 Cal. Legis. Serv. ch. 348 (giving the State Water Resources Control Board power to place a basin on probationary status if certain deadlines were not met).

29. Signing Press Release, *supra* note 17.

30. See AB 1168, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (enacted by Chapter 346); AB 1739, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (enacted by Chapter 347); AB 1319, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (enacted by Chapter 347) (including measurable milestones every few years, giving the State Water Board and Department of Water Resources (DWR) "backstop" authority, and allowing local agencies to charge fees to enforce their GSPs are some such recommendations).

31. RECOMMENDATIONS, *supra* note 14, at 5–7, 9–10, 12; CAL. WATER FOUND., RECOMMENDATIONS FOR SUSTAINABLE GROUNDWATER MANAGEMENT: DEVELOPED THROUGH A STAKEHOLDER DIALOGUE 22–24, 27–30 (2014).

32. See CALIFORNIA WATER ACTION PLAN, *supra* note 16 (including basin priorities, formation of GSAs, and the implementation of GSPs).

SGMA's deadlines affect appropriative rights.³³ Subsection two discusses how private companies can join a Groundwater Sustainability Agency (GSA), and subsection three discusses SGMA's requirements for implementing a Groundwater Sustainability Plan (GSP) and what happens when a GSA fails to adopt one.³⁴

1. Basin Priority and Appropriative Rights

The Department of Water Resources (DWR) must evaluate and designate groundwater basins as very low, low, medium, and high-priority.³⁵ Basins designated as high- or medium-priority must adopt a GSP by January 31, 2020.³⁶ During GSP development, SGMA prohibits groundwater users from increasing their water usage to expand appropriative rights.³⁷

2. Formation of a GSA

Initiation of GSA formation may include both local agencies and private mutual water companies through a Joint Powers Agreement (JPA).³⁸ The powers given to a private mutual water company are the same as the rest of the parties so the JPA does not alter the authority of the GSA.³⁹ Once formed, the GSA must inform DWR of its creation and submit its area of control for evaluation.⁴⁰ A single GSA need not cover the entire basin; however, all individual GSAs must coordinate their GSPs to reach one sustainability goal.⁴¹

3. Implementation of a GSP and the Consequences of Failure

GSAs wield authority ranging from collecting fees to conducting investigations in order to best implement a GSP.⁴² In order to ensure progress towards sustainability, a GSP must use a fifty-year "planning and implementation horizon" with measurable objectives and milestones every five years.⁴³ If a GSA fails to meet SGMA's requirements, the State Water Board may place all or part

33. See *infra* Part II.B.1 (describing that basins are prioritized by their status of priority).

34. See *infra* Part II.B.2–3 (showing that private companies can join a GSA through JPAs and demonstrating what happens when a GSA fails to adopt a GSP).

35. See CAL. WATER CODE §§ 10720.5–10735.2 (West 2015) (existing law regarding priority under Sustainable Groundwater Management Act).

36. *Id.* § 10735.2(a)(5)(A).

37. *Id.* § 10720.5(a).

38. *Id.* § 10723.6(a).

39. *Id.*

40. *Id.* § 10723.8(a).

41. *Id.* § 10727.6.

42. *Id.* §§ 10725(a), 10726.8(a).

43. *Id.* §§ 10721(q), 10727.2(b)(1).

of a basin on probationary status and develop an interim plan of its own.⁴⁴ However, the State Water Board may exempt “good actors” who attempt to meet SGMA’s requirements, but fail because of an uncooperative party.⁴⁵

III. CHAPTER 255

Chapter 255 makes some changes to the Sustainable Groundwater Management Act.⁴⁶ The original SGMA left several fundamental questions unanswered, thereby preventing effective implementation of GSPs.⁴⁷ Chapter 255 attempts to remedy some of these issues by granting extensions to SGMA deadlines when litigation delays implementation of a GSP and by making a slight change to how private mutual water companies can join GSAs.⁴⁸

Chapter 255 reflects the possibility that litigation may prevent interested parties from meeting SGMA’s deadlines.⁴⁹ For example, GSAs must establish basin boundaries within five years after a basin is reprioritized as medium- or high-priority.⁵⁰ The State Water Board has discretion to extend that deadline for a period equal to the length of the litigation, if the GSA can show that litigation prevented implementation of a GSP that was likely to reach the GSA’s sustainability goal.⁵¹ Therefore, Chapter 255 allows the State Water Board to treat litigation delay as a factor when making a probationary status designation.⁵²

Chapter 255 limits private mutual water companies’ ability to join GSAs to either a memorandum of agreement or other limited legal agreement.⁵³ Chapter 255 removes JPAs as a possible method of forming GSAs with private mutual water companies.⁵⁴ Chapter 255 also ensures that private mutual water companies do not gain any special or additional powers through such an agreement.⁵⁵

44. *Id.* § 10735.4(c).

45. *Id.* § 10735.2(e).

46. *See* CAL. WATER CODE §§ 5202, 10720.5, 10720.7, 10722.2, 10722.4, 10723, 10723.6, 10723.8, 10724, 10726.8, 10730.2, 10733.2, 10733.3, 10735.2, 10735.4, 10735.6, and 10933 (amended by Chapter 255) (amending sections of the California Water Code originally enacted by SGMA).

47. *See* WATER §§ 10727.2, 10728.6 (failing to address what happens when litigation impedes implementation of a GSP, how a GSA can encourage the cooperation of state entities, the availability of private funding, and how CEQA applies to the formation of GSAs).

48. *See infra* Part III (explaining the changes made by Chapter 255).

49. *See* CAL. WATER CODE § 10735.2(d) (enacted by Chapter 255) (providing extensions if litigation does prevent meeting deadlines).

50. *Id.* § 10722.4(d) (enacted by Chapter 255).

51. *Id.* § 10735.2(d) (enacted by Chapter 255).

52. *Id.*

53. *Id.* § 10723.6(b) (enacted by Chapter 255).

54. *See id.* 10723.6(b) (enacted by Chapter 255) (specifying that private mutual water companies and Public Utilities Companies do not have access to JPAs as a means of joining GSAs).

55. *See id.* (subjecting private companies to local control).

IV. ANALYSIS

The goal of Chapter 255 is to implement the Sustainable Groundwater Management Act efficiently and effectively.⁵⁶ There were too many uncertainties to effectively adopt GSPs under SGMA.⁵⁷ While Chapter 255 effects a few small changes, it is not nearly as aggressive as it could be.⁵⁸ Allowing the State Water Board to stay a probationary status designation may seem like a drastic change from existing law, but staying the designation for a period equal in length to delaying litigation is not as helpful as previously proposed legislation.⁵⁹ The two five-year extensions proposed in AB 617—before the Senate Committee on Natural Resources and Water amended it—would have provided GSAs with more leeway to meet deadlines in the event of litigation delays.⁶⁰ Additionally, allowing private mutual water companies to join GSAs is helpful to dwindling GSA membership; however, preventing private mutual water companies from exercising JPAs limits versatility.⁶¹ Section A compares the deadline extensions in Chapter 255 and those in AB 617.⁶² Section B explores the ability for private mutual water companies to join GSAs.⁶³ Section C discusses the changes that Chapter 255 did not incorporate and the possible ramifications this could have on SGMA.⁶⁴ Finally, Section D examines Chapter 255 as a piece of consensus legislation.⁶⁵

56. *See id.* §§ 5202, 10720.5, 10720.7, 10722.2, 10722.4, 10723, 10723.6, 10723.8, 10724, 10726.8, 10730.2, 10733.2, 10733.3, 10735.2, 10735.4, 10735.6, and 10933 (amended by Chapter 255) (making changes to SGMA that clear up questions and inefficiencies).

57. *Compare* CAL. WATER CODE §§ 10720.5–10735.4 (West 2015) (showing SGMA as enacted in 2014), with SB 13, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (enacted by Chapter 255) (amending and adding sections to SGMA that clarify ambiguities).

58. *Compare* CAL. WATER CODE §§ 5202, 10720.5, 10720.7, 10722.2, 10722.4, 10723, 10723.6, 10723.8, 10724, 10726.8, 10730.2, 10733.2, 10733.3, 10735.2, 10735.4, 10735.6, and 10933 (amended by Chapter 255) (detailing SGMA’s deadlines and procedures), with AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted) (proposing changes to SGMA’s deadlines and procedures).

59. *Compare* CAL. WATER CODE § 10735.2(d) (enacted by Chapter 255) (SGMA’s litigation procedures regarding probationary basins), with AB 617 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted) (proposing changes in classification of probationary basins due to delay caused by litigation).

60. *See* AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted) (providing a possible extension totaling ten years—a period likely to outlast most litigation).

61. *See* CAL. WATER CODE § 10735.2(b) (enacted by Chapter 255) (excluding joint powers agreements as a means for private mutual water companies from joining GSAs).

62. *See infra* Part IV.A (comparing the deadline extensions given by AB 617 and Chapter 255).

63. *See infra* Part IV.B (describing private mutual water companies and GSAs).

64. *See infra* Part IV.C (demonstrating the negative implications arising from Chapter 255 not including some of AB 617’s proposals).

65. *See infra* Part IV.D (explaining that Chapter 255 is a consolidated bill).

A. *Defining Litigation as “Good Cause:” Chapter 255 vs. AB 617 Before Consolidation*

GSAs face three main types of litigation: (1) litigation challenging the GSA’s authority; (2) CEQA litigation for projects that have a severe impact on the environment; and (3) adjudications.⁶⁶ Adjudications will likely create uncertainty when implementing GSPs.⁶⁷ Also, certain adjudications must be determined before implementing a GSP because questions, such as the validity of pumping restrictions, create far-reaching consequences for everyone, from corporations to farmers.⁶⁸ Both Chapter 255 and AB 617 include litigation in the definition of “good cause” for deadline extensions.⁶⁹ By doing so, they clarify the vehicle by which the State Water Board can institute or delay state backstop procedures.⁷⁰ Chapter 255 allows—and AB 617 would have allowed—a GSA to have advanced knowledge of changed deadlines when implementing a GSP, because it gives DWR the ability to stay the State Water Board’s intervention.⁷¹

Opponents of AB 617 probably feared that GSAs would use unrelated litigation to delay implementing parts of a GSP.⁷² Therefore, Chapter 255’s limitations on the length of extensions may relieve this concern.⁷³ While opponents had a right to be concerned, AB 617 provided useful clarity for when the State Water Board could stay an intervention.⁷⁴ With AB 617’s language, GSAs would have more concretely understood the length of their extensions.⁷⁵ DWR’s reevaluation of the extension after the first five years would almost certainly help mitigate any fear of unneeded delays.⁷⁶ Chapter 255 moves in the right direction; however, having a definite end to deadline extensions would be more beneficial for GSP implementation.⁷⁷

66. Interview with Jennifer Harder, Professor, McGeorge School of Law (July 2, 2015) (on file with *The University of the Pacific Law Review*).

67. *Id.*

68. *Id.*

69. CAL. WATER CODE § 10735.2(d); AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted).

70. *See* AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted) (giving the State Water Board definitive directions to adhere to DWR’s granting of five-year extensions).

71. *See* CAL. WATER CODE § 10735.2(d) (enacted by Chapter 255) (giving GSAs a deadline extension equal to the length of the litigation); *see also* AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted) (giving a GSA up to two five-year extensions to resolve any litigation and properly move forward with implementing a GSP in the most informed way possible).

72. Interview with Jennifer Harder, *supra* note 66.

73. *See* CAL. WATER CODE § 10735.2(d) (enacted by Chapter 255) (changing the AB 617 language to offer a less definite period of deadline extensions).

74. *See supra* Part IV.A (defining AB 617’s “good cause” for allowing a stay of intervention).

75. AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted).

76. *Id.* (requiring DWR to reevaluate the extension after five years rather than just giving a ten-year extension initially).

77. *See supra* Part IV.A (comparing the benefits of deadline extensions in AB 617 with Chapter 255).

B. Including Private Mutual Water Companies in GSAs: Chapter 255 vs. AB 617 Before Consolidation

Chapter 255 allows GSAs to include private mutual water companies through a memorandum of understanding or some other legal agreement.⁷⁸ In contrast, AB 617 granted private mutual water companies all powers in common between members of a GSA through a JPA.⁷⁹ One pitfall of AB 617 was that it did not define the transparency requirements of JPAs.⁸⁰ This is significant because existing law requires different levels of public access to local public agency meetings and private water company meetings.⁸¹ To determine the benefits of AB 617's method, it is necessary to examine the transparency requirements for local public agencies, the transparency requirements of private mutual water companies, including pending legislation, and finally, the ambiguities between AB 617 and the laws governing JPAs.⁸²

1. Local Public Agency Transparency

Local public agencies are subject to the Ralph M. Brown Act (Brown Act).⁸³ The Brown Act prohibits private discussion or deliberation of a quorum of public agency board members from discussing issues within their subject matter jurisdiction to ensure that there is transparency in their decisions.⁸⁴ It also requires the public agency to publish notice of regular and advisory meetings.⁸⁵ The Brown Act also limits the location of these meetings to the boundary of the territory in which the agency exercises jurisdiction.⁸⁶ The legislature added these transparency restrictions because it believed that public agencies exist for the people and that they should operate openly.⁸⁷

2. Private Mutual Water Company Transparency and Recent Legislation

The Brown Act does not regulate private mutual water companies; however, Chapter 633 of the Statutes of 2013 added sections 14305–14307 to the Corporations Code, requiring most mutual water companies to use more

78. CAL. WATER CODE § 10723.6(b) (enacted by Chapter 255).

79. AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted).

80. *Id.*

81. Compare CAL. GOV'T CODE § 54950 (West 2015) (imposing open meeting requirements on local public agencies), with CAL. CORP. CODE § 14305 (West 2015) (requiring admittance of eligible parties to regular meetings, but not to meetings called as “executive sessions”).

82. See *infra* Part IV.B.3 (discussing transparency requirements and ambiguities in the current law).

83. CAL. GOV'T CODE § 54950 et seq. (West 2015).

84. *Id.* § 54952.2(b)(1).

85. *Id.* § 54954(a).

86. *Id.* § 54954(b).

87. *Id.* § 54950.

transparent practices.⁸⁸ Dubbed the “Mutual Water Company Open Meeting Act,” section 14305 allows eligible parties access to board of directors’ meetings.⁸⁹ But, this access ends when the board of directors meets in an “executive session.”⁹⁰ Currently, a board of directors can call a private, executive session for a variety of reasons and only record the session in the next regular meeting’s minutes.⁹¹ Some do not find this method of open meetings to be effective.⁹²

Assembly Member Chris Holden introduced Chapter 669 to amend section 14305 in 2015.⁹³ Chapter 669 prohibits private mutual water company board members from calling executive sessions outside of a regular meeting.⁹⁴ This change ensures that interested parties have access to the regular meeting even if they cannot listen in on the executive session.⁹⁵ While private mutual water companies are not subject to the same requirements as public agencies, and while Chapter 669 provides more transparency, the Corporations Code imposes additional open meeting requirements.⁹⁶

3. AB 617 and Joint Powers Agreements

As discussed above, the Brown Act does not regulate private mutual water companies.⁹⁷ However, it does require JPA meetings to occur within limited areas.⁹⁸ Critics of AB 617 were uncertain whether the Brown Act or California Corporations Code would apply to control private mutual water company operations.⁹⁹ Although AB 617 no longer addresses transparency, if private companies were allowed to join GSAs through a JPA, it would undoubtedly provide more versatility to GSA formation.¹⁰⁰ Thus, Chapter 255’s rejection of JPAs as an option to include private mutual water companies in GSAs significantly limits versatility.¹⁰¹

88. See CAL. CORP. CODE. § 14305(b) (West 2015).

89. *Id.* § 14305(b).

90. *Id.*

91. *Id.* § 14305(b)–(c).

92. See AB 1077, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (enacted by Chapter 669) (attempting to amend section 14305 of the California Corporations Code to restrict the occasions of executive sessions and the delay in recording one’s occurrence).

93. *Id.*

94. *Id.* § 14305(b)(2).

95. *Id.*

96. Compare CAL. GOV’T CODE § 54950 (West 2015) (imposing open meeting requirements on local public agencies), and AB 1077, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (enacted by Chapter 669) (preventing board members from calling executive sessions outside of a general meeting), with CORP. CODE § 14305 (providing a variety of requirements for open meetings).

97. See *supra* note 92 and accompanying text.

98. GOV’T CODE § 54954(d).

99. Interview with Jennifer Harder, *supra* note 66.

100. See *supra* Part IV.A.1–2 (discussing JPAs in relation to private mutual water companies).

101. See *supra* Part IV.B (discussing the versatility of JPAs in GSA formation).

C. The Legal Ramifications of Not Including All of AB 617's Proposed Changes

AB 617 introduced several changes to SGMA that Chapter 255 excluded when consolidating groundwater legislation.¹⁰² The first change exempts forming GSAs from CEQA.¹⁰³ The second creates default GSAs.¹⁰⁴ The third consolidates the definitions of “in lieu use” and “groundwater recharge.”¹⁰⁵ The final change AB 617 made was to the tolling provisions that prevented over allocation of prescriptive rights.¹⁰⁶

1. Why Have Chapter 255 Exempt GSA Formation from CEQA?

“CEQA is a focal point of litigation against public agencies.”¹⁰⁷ The legislature enacted CEQA to mitigate significant environmental impacts.¹⁰⁸ Since CEQA’s enactment, the legislature has enacted more than 120 additional environmental laws.¹⁰⁹ Unfortunately, when an agency satisfies these other environmental laws, it frequently expects a CEQA lawsuit.¹¹⁰ These lawsuits delay or entirely prevent projects with any environmental impact and often serve as a deterrent for even environmentally desirable projects.¹¹¹ The fear of an abusive CEQA lawsuit often inhibits CEQA’s ability to protect the environment.¹¹²

When the legislature enacted SGMA, it recognized that CEQA could potentially harm a GSA.¹¹³ SGMA exempted GSPs from CEQA.¹¹⁴ While Chapter 255 did not remove the GSP exception to CEQA, its author did not share the opinion that an exception for GSA formation logically flowed backwards in the SGMA process.¹¹⁵ There can always be litigation about the formation of GSAs for

102. See *supra* Part IV.A–B (comparing the provisions of AB 617 that were removed when Ab 617 was consolidated into Chapter 255).

103. See *infra* Part IV.C.1 (discussing why exempting GSA from CEQA is beneficial).

104. See *infra* Part IV.C.2 (explaining default GSAs).

105. See *infra* Part IV.C.3 (discussing in lieu use of groundwater recharge).

106. See *infra* Part IV.C.4 (analyzing over allocation of prescriptive rights).

107. Interview with Jennifer Harder, *supra* note 66.

108. Cal. Natural Res. Agency, *Frequently Asked Questions about CEQA*, <http://resources.ca.gov/ceqa/more/faq.html> (last visited July 6, 2015) [hereinafter *FAQs*] (on file with *The University of the Pacific Law Review*).

109. POLICY PRINCIPLES FOR CEQA MODERNIZATION, CEQA WORKING GROUP (2015), available at http://rctc.org/uploads/media_items/ceqa-working-group-policy-principles-fact-sheet.original.pdf (on file with *The University of the Pacific Law Review*).

110. *Id.*

111. *Id.*

112. See *id.* (stressing that thoughtful modernization of CEQA can both prevent its abuse and preserve its intent of protecting the environment).

113. See CAL. WATER CODE § 10728.6 (exempting GSPs from CEQA’s requirements).

114. *Id.*

115. AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted); Interview with Jennifer Harder, *supra* note 66.

other reasons, but the high likelihood of a CEQA lawsuit necessitated AB 617 to exempt forming GSAs from CEQA.¹¹⁶ Otherwise, the GSA may not have formed by SGMA's June 30, 2017 deadline and would have required DWR to grant extensions, ultimately delaying a basin from reaching its sustainability goal.¹¹⁷ This effect may be undesirable, and therefore, Chapter 255 may have benefited from exempting GSA formation from CEQA.¹¹⁸

2. Default GSAs

The inability to saturate a basin with GSAs poses a common problem for SGMA.¹¹⁹ While relying on local control allows for tailored sustainability policies, local agencies might not participate.¹²⁰ AB 617 attempted to create fallback agencies for when GSAs did not fully cover a basin.¹²¹ This type of situation required a delicate touch because maintaining local control was a cornerstone of SGMA.¹²² If the situation did arise, AB 617 would have designated the county in which the basin lies as the default GSA.¹²³ However, the county could have refused to be the GSA.¹²⁴ If the county did refuse, individual water users would have been required to report groundwater extractions.¹²⁵ While this reporting method helps prevent unnecessary or non-beneficial pumping, a cooperative plan cannot exist under such reporting standards.¹²⁶

Without a designated GSA, the State Water Board may place part of a basin on probationary status and institute an interim plan.¹²⁷ Unfortunately, this would defeat the purpose of utilizing local agencies to create sustainability.¹²⁸ Without further refinement, AB 617 failed to determine who would be next in line as a

116. See *infra* text accompanying notes 141–42.

117. See generally AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted).

118. See *supra* Part IV.C.1 (detailing the benefits of exempting GSA formation from CEQA).

119. Interview with Jennifer Harder, *supra* note 66.

120. See AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted) (anticipating that local agencies may not elect to for GSAs).

121. See *id.* (designating the county in which the basin lies as the fallback GSA).

122. See e.g., AB 1168, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (enacted by Chapter 346); AB 1739, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (enacted by Chapter 347).

123. AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted).

124. *Id.*

125. *Id.*

126. See CAL. WATER CODE § 5203 (West 2015) (requiring detailed reports by individual groundwater extractors but offering no overall protection of the groundwater basin).

127. AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted)

128. Compare *id.* (resulting in sustainability plan by the State Water Board—a state entity), with SGMA BROCHURE, *supra* note 13 (stating that the goal of SGMA is to provide local agencies with control over groundwater basins).

default GSA.¹²⁹ When Chapter 255 consolidated AB 617, it did not clarify this question.¹³⁰ Of course, an interim plan creates more sustainability than no plan, but the goal of the SGMA required full participation by local agencies.¹³¹ AB 617 moved toward the goal of sustainability, but Chapter 255 did not build upon that progress.¹³²

3. In Lieu Use as Groundwater Recharge

The concept of “in lieu use” refers to using surface water in place of groundwater systems to recharge over-drafted groundwater basins.¹³³ Section 1200 of the California Water Code, which gives the State Water Board jurisdiction over surface water and subterranean streams, has necessitated in lieu use.¹³⁴ This necessity arose because Courts have upheld Section 1200 as excluding percolating groundwater, limiting the State Water Board’s ability to utilize those particular subterranean systems.¹³⁵ This limitation is significant because the use of percolating groundwater would drastically increase California’s ability to recharge over-drafted basins.¹³⁶ Recently, a concept called “interconnected systems” has affected in lieu use.¹³⁷ Interconnected systems are a combination of surface water and groundwater systems that become interconnected when percolating groundwater is pumped in amounts that begin to affect surface water levels.¹³⁸ These interconnected systems may give the State

129. See AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted) (failing to designate another GSA should a county refuse to be the default).

130. See 2015 Cal. STAT. ch. 255 (failing to designate another GSA should a county refuse to be the default as well).

131. See SGMA BROCHURE, *supra* note 13 (stating that the intent of SGMA is to provide a framework for local agencies to sustainably manage groundwater basins).

132. See *supra* Part IV.C.2 (discussing the progress AB 617 made toward sustainability).

133. See Interview with Jennifer Harder, *supra* note 66 (referring to “in lieu use” as using surface water to recharge groundwater basins).

134. CAL. WATER CODE §1200 (West 2015); Interview with Jennifer Harder, *supra* note 66.

135. See *N. Gualala Water Co. v. State Water Res. Control Bd.*, 139 Cal. App. 4th 1577, 1606 (2006) (upholding the State Water Board’s four-part test to differentiate subterranean streams from percolating groundwater and thus granting the State Water Board jurisdiction because the groundwater in question was determined to be a subterranean stream); see also Interview with Jennifer Harder, *supra* note 66 (discussing subterranean streams and how they are different from percolating groundwater).

136. See AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted) (including surface water in lieu of groundwater as a method to replenish depleted groundwater basins).

137. See AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted) (defining “significant depletions of interconnected surface waters” as having to do with a reduction in surface water flows that are connected to groundwater basins); see also Interview with Harder, *supra* note 66 (discussing the reduction in surface water flows that are connected to groundwater).

138. See *supra* note 137 (defining “interconnected systems”).

Water Board a method to obtain jurisdiction over percolating groundwater using the Public Trust Doctrine and are the subject of *ELF v. The State Water Board*.¹³⁹

The State Water Board has jurisdiction over all publicly used waterways through the Public Trust Doctrine.¹⁴⁰ When pumping percolating groundwater affects surface water and harms the public uses covered under the Public Trust Doctrine, it is uncertain whether the State Water Board then has jurisdiction over the percolating groundwater.¹⁴¹ The outcome of *ELF v. The State Water Board* could define whether groundwater recharge can include “in lieu” use in its definition, but by not resolving the issue statutorily, Chapter 255 leaves the issue to the uncertainties of litigation.¹⁴² While groundwater recharge remains essential to over-drafted groundwater basins, the ambiguity of what counts as groundwater recharge will inhibit enough recharge from happening until it is resolved.¹⁴³

Opponents of AB 617 feared that including in lieu use as groundwater recharge would allow users to abuse the system through false claims of groundwater recharge.¹⁴⁴ While this fear was legitimate, AB 617 provided a means to increase sorely needed groundwater recharge.¹⁴⁵ Therefore, Chapter 255 should have considered merging the definition of “in lieu use” with that of “groundwater recharge.”¹⁴⁶

4. Over-Allocation of Prescriptive Rights

The State Water Board bases prescriptive groundwater rights on how much water a rights-holder actually uses.¹⁴⁷ The opposition feared a “rush to the pump house” where water users attempt to increase their appropriation rights by increasing their usage amount during the evaluation period.¹⁴⁸ Opponents

139. See Second Amended Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief, *Env'tl. Law Found. Pac. Coast Fed'n of Fishermen's Ass'n v. State Water Res. Control Bd.*, Case No. 34-2010-80000583 (Oct. 4, 2013) (requesting that the Court require the State Water Board use the Public Trust Doctrine to prevent Siskiyou County from issuing well-drilling permits); see also Interview with Harder, *supra* note 66 (discussing the State Water Board use of the Public Trust Doctrine).

140. *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 444 (1983); Interview with Harder, *supra* note 66.

141. Compare *Nat'l Audubon Soc'y*, 33 Cal. 3d. at 436 (holding that the Public Trust Doctrine should apply to the “extraction of water that destroys navigation and other public interests” [emphasis omitted]), and Interview with Harder, *supra* note 66, with Second Amended Petition, *supra* note 139 (continuing litigation regarding the Public Trust Doctrine).

142. See Second Amended Petition, *supra* note 139 (continuing litigation that may give the State Water Board the ability to regulate percolating groundwater extraction if the Public Trust Doctrine applies).

143. AB 647 FACT SHEET, *supra* note 5, at 2.

144. Interview with Jennifer Harder, *supra* note 66.

145. See AB 647 FACT SHEET, *supra* note 5, at 2 (explaining the dire importance of groundwater recharge in California).

146. See *supra* Part IV.C.3 (showing the benefits of including “in lieu use” in the definition of groundwater recharge).

147. *FAQs*, *supra* note 108

148. Interview with Harder, *supra* note 66.

believed that changing the language of the tolling requirements would cause water users to “rush to the pump house” before the actual adoption of the GSP.¹⁴⁹ Once GSP implementation occurred, GSAs could begin regulating percolating groundwater rights for the first time.¹⁵⁰ AB 617 could have approached the prescriptive right allocation issue more carefully, and, for this reason, Chapter 255’s failure to change the prescriptive right tolling provisions may not have been in error.¹⁵¹

D. Chapter 255 as Consensus Legislation

Legislators put forth several groundwater bills during the 2015 session, including Chapter 255, AB 453, AB 939, AB 1242, and AB 617.¹⁵² When these bills reached the Senate Committee on Natural Resources and Water—chaired by Senator Pavley—the Committee consolidated each bill into Chapter 255.¹⁵³ Streamlining these bills into one piece of legislation would have been effective, if that single streamlined bill had incorporated language that would have better implemented SGMA’s objectives.¹⁵⁴ Chapter 255 is a less effective piece of consensus legislation because it does not include the aggressive changes AB 617 contained, which would have provided more opportunities to achieve the goal of groundwater sustainability.¹⁵⁵ Senator Pavley’s strong and focused leadership over groundwater legislation this session has left SGMA in nearly the same state as when enacted.¹⁵⁶

There is a clear difference between Chapter 255 and AB 617 in the number of changes each made and the aggressiveness of those changes: Chapter 255 only makes two substantive changes, neither of which are as aggressive as AB 617’s suggested changes.¹⁵⁷ Furthermore, three of the four changes Chapter 255 excluded had promising possibilities for bettering SGMA and achieving

149. *Id.* (discussing the tolling requirements change of restricting pumping between January 1, 2015 and when a GSP is adopted to between January 1, 2015 and when an “action to regulate groundwater extractions” occurs)

150. *Id.*

151. *See supra* Part IV.C.4 (discussing the merits of not accepting AB 617’s changes to the tolling provisions).

152. AB 453, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on July 6, 2015, but not enacted); AB 939, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as introduced on February 26, 2015, but not enacted); AB 1242, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 5, 2015, but not enacted); AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted).

153. *See* 2015 Cal. STAT. ch. 255 (as amended May 21, 2015, but not enacted) (consolidating AB 453, AB 939, AB 1242, and AB 617 into Chapter 255).

154. *See supra* text accompanying note 49.

155. AB 617, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on June 29, 2015, but not enacted).

156. *See supra* Part IV.C (discussing the possible changes to SGMA that Chapter 255 could have made).

157. *See supra* notes 115, 129, 145 and accompanying text.

groundwater sustainability.¹⁵⁸ But, as Governor Brown has made clear, now is not the time to make small adjustments to groundwater sustainability.¹⁵⁹ If the State cannot recharge its groundwater aquifers and create sustainable groundwater plans, then irreversible consequences, such as land subsidence, will continue to plague California's groundwater basins.¹⁶⁰ Perhaps SGMA and Chapter 255 will be enough for California's groundwater basins to avoid the permanent and irreversible damage that is already beginning to take place and that more drastic legislation is not necessary.¹⁶¹

V. CONCLUSION

California relies heavily on its water supply to provide drinking water, promote agriculture, and prevent fires.¹⁶² Groundwater is an essential part of that supply.¹⁶³ Ensuring that California uses its groundwater basins in a sustainable manner is essential to navigating the current drought and protect against future droughts.¹⁶⁴ While imperfect, SGMA is a step toward obtaining statewide groundwater sustainability.¹⁶⁵ Chapter 255 fleshes out SGMA, but SGMA may require more aggressive changes to ensure a steady stream of sustainable groundwater in California.¹⁶⁶

158. See *supra* Part IV.C (discussing how exempting GSA formation from CEQA, identifying default GSAs, and including in lieu use in the definition of groundwater recharge would benefit SGMA).

159. See AB 647 FACT SHEET, *supra* note 5 (detailing the dire situations of over-drafted groundwater aquifers).

160. *Id.*

161. See *supra* note 143 and accompanying text.

162. See Emergency Press Release, *supra* note 1 (asking Californians to conserve water to protect agriculture, prevent fires, and prevent a shortage in drinking water).

163. AB 647 FACT SHEET, *supra* note 5.

164. See *id.* (explaining the importance of groundwater recharge—a part of sustainable basin operation—to prevent permanent damage).

165. Press Release, CA Water Found., *supra* note 7, at 1. (quoting Lester Snow, executive director of the California Water Foundation, that SGMA was “a long overdue system for managing groundwater resources”).

166. See *supra* Part IV.A–B (discussing changes to SGMA that could help reach permanent groundwater sustainability).